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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

PHILLIP R. ORDONEZ, LOIDA S.  
ORDONEZ, and ED BRINGAS,

CASE NO. CV F 08-1148 LJO GSA

Plaintiffs,

**ORDER ON DEFENDANTS’ MOTION TO  
DISMISS (Doc. 9)**

vs.

SAXON MORTGAGES SERVICES,  
INC., et al.,

Defendants.

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**INTRODUCTION**

Defendants Saxon Mortgage Services, Inc. (“Saxon”) and Deutsche Bank Trust Company Americas (“Deutsche Bank”) (collectively “defendants”) move to dismiss plaintiffs Phillip R. Ordonez, Loida S. Ordonez (collectively “plaintiffs”), and Ed Bringas’ (“Mr. Bringas”) real estate claims as non-cognizable and lacking sufficient facts for requested relief. Plaintiffs, proceeding in propria persona, failed to oppose defendants’ motion. For the following reasons, this Court GRANTS in part and DENIES in part defendants’ motion to dismiss. This Court VACATES the February 19, 2009 hearing and ORDERS Plaintiffs, no later than March 6, 2009, to file and serve: (1) a first amended complaint to comply with federal pleading requirements and this Court’s Local Rules; or (2) a statement that they abandon their claims. Failure to file an amended complaint on or before March 6, 2009 shall result in dismissal of this action.

1 **BACKGROUND**

2 **Underlying Loan**

3 Plaintiffs Phillip Ordonez and Loida Ordonez obtained a series of refinancing loans secured by  
4 the real property located at 35885 Lodge Road in Tollhouse, California (“property”). First, on July 28,  
5 2005, plaintiffs executed a deed of trust to secure a debt in the amount of \$290,000.00 plus interest  
6 (“2005 Loan”). Next, on April 5, 2006, plaintiffs executed a subsequent deed of trust to secure a debt  
7 in the amount of \$399,000.00 plus interest (“2006 Loan”). The 2005 and 2006 Loans were each  
8 obtained from Saxon and secured by the subject property. On February 27, 2007, plaintiffs executed a  
9 third deed of trust to secure a debt in the principal amount of \$517,000.00 plus interest (“2007 Loan”).  
10 The 2007 loan was used to refinance prior loans funded by Saxon, and was secured by the property.  
11 Saxon is the original lender of the 2007 Loan.

12 Plaintiffs defaulted on the 2007 Loan on January 2008. Saxon, as the beneficiary under the 2007  
13 Loan, recorded a Notice of Default and Election to Sell Under Deed of Trust through its agent,  
14 defendant Quality Loan Service Corporation. On April 18, 2009, a Notice of Trustee’s Sale was  
15 recorded indicating that a trustee’s sale would take place on August 11, 2008. On June 6, 2008, Saxon  
16 assigned and transferred its interest in the deed of trust to Deutsche Bank. On August 11, 2008, the  
17 trustee’s sale occurred and title to the property transferred to Deutsche Bank.

18 **Allegations and Claims**

19 The operative original complaint (“complaint”) alleges that plaintiffs contracted with defendant  
20 Pacific Standard Mortgage Company (“Pacific”) to be their mortgage broker. On February 27, 2007,  
21 Saxon and Pacific conducted a loan closing to consummate the 2007 Loan. The 2007 Loan provided  
22 by Saxon was an Adjustable Rate Balloon Note 2-28 balloon mortgage with a variable interest rate of  
23 10.826% annual percentage rate. Plaintiffs allege that at the February 27, 2007 loan closing:

- 24 1. No Pacific representative was present;
- 25 2. No explanation was given about the documents plaintiffs were signing;
- 26 3. No explanation was given about the type of loan program provided to plaintiffs;
- 27 4. Plaintiffs were not informed of their right to cancel the loan within 3 days;
- 28 5. Plaintiffs were not informed of their right to rescind;



1 evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether  
2 a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the  
3 claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974); *Gilligan v. Jamco Development Corp.*, 108 F.3d  
4 246, 249 (9th Cir. 1997). A Rule 12(b)(6) dismissal is proper where there is either a “lack of a  
5 cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.”  
6 *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

7 In resolving a Rule 12(b)(6) motion, the court must: (1) construe the complaint in the light most  
8 favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine  
9 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*  
10 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is “free to ignore legal  
11 conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in  
12 the form of factual allegations.” *Farm Credit Services v. American State Bank*, 339 F.3d 765, 767 (8th  
13 Cir. 2003) (citation omitted). A court need not permit an attempt to amend a complaint if “it determines  
14 that the pleading could not possibly be cured by allegation of other facts.” *Cook, Perkiss and Liehe, Inc.*  
15 *v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). “While a complaint attacked by a  
16 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to  
17 provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a  
18 formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 127  
19 S. Ct. 1955, 1964-65 (2007) (internal citations omitted).

20 For a Rule 12(b)(6) motion, a court generally cannot consider material outside the complaint. *Van*  
21 *Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003). Nonetheless, a court may  
22 consider exhibits submitted with the complaint. *Van Winkle*, 290 F.Supp.2d at 1162, n. 2. A court may  
23 also consider “documents ‘whose contents are alleged in a complaint and whose authenticity no party  
24 questions, but which are not physically attached to the [plaintiff’s] pleading.’” *Parrino v. FHP, Inc.*, 146  
25 F.3d 699, 705 (9th Cir. 1998) (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)). A “court  
26 may disregard allegations in the complaint if contradicted by facts established by exhibits attached to  
27 the complaint.” *Sumner Peck Ranch v. Bureau of Reclamation*, 823 F.Supp. 715, 720 (E.D. Cal. 1993)  
28 (citing *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987)). Moreover, “judicial notice

1 may be taken of a fact to show that a complaint does not state a cause of action.” *Sears, Roebuck & Co.*  
2 *v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956); *see Estate of Blue v. County of Los*  
3 *Angeles*, 120 F.3d 982, 984 (9th Cir. 1997). As such, this Court may consider the pertinent loan  
4 documents.

5 With these standards in mind, the Court now turns to defendants’ arguments.

6 **Ed Bringas Dismissed as Plaintiff**

7 The Court first considers whether Mr. Bringas lacks standing as a plaintiff in this action.  
8 According to the complaint, Mr. Bringas holds ownership interest in the property and plaintiffs Ordonez  
9 are permanent residents of the property. (Compl. ¶¶3-5). Mr. Bringas is identified in no other factual  
10 allegations of the complaint. The complaint also alleges that the plaintiffs Ordonez have owned the  
11 property since 2000. (Compl.¶28).

12 Mr. Bringas bears the burden to prove standing by showing an injury in fact, causation, and  
13 redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Mr. Bringas failed to  
14 oppose defendants’ motion to dismiss and does not otherwise demonstrate that he has standing to assert  
15 a cause of action against defendants. The complaint is unclear as to whether Mr. Bringas has a continued  
16 ownership interest in the property. Moreover, the allegations of the complaint concern purported  
17 violations of RESPA, intentional interference with contractual relationship, restitution, fraud, TILA, and  
18 “predatory mortgage loan servicing.” These causes of action relate to the 2007 Loan transaction. Mr.  
19 Bringas, however, was not a party to the 2007 Loan. The plaintiffs Ordonez are signatories to that  
20 agreement. Thus, the facts relate to the plaintiffs Ordonez, their legal rights and interests in the 2007  
21 Loan. Accordingly, this Court dismisses Mr. Bringas as a plaintiff for lack of standing. *See Elk Grove*  
22 *Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 14 (2004).

23 **RESPA Claims**

24 Defendants challenge plaintiffs’ (first and second) RESPA causes of action as untimely. The  
25 statute of limitations to bring a claim under 12 U.S.C. §2607 is one year from the date of the occurrence  
26 of the alleged violation. 12 U.S.C. §2614. The one year limitations period commences no later than the  
27 date of actual disclosure of actions constituting the alleged violation. *Katz v. Bank of California*, 640  
28 F.2d 1024, 1025 (9th Cir. 1981).

1 Plaintiffs allege that the 2007 Loan closed on February 27, 2007 (Compl. ¶39). Plaintiffs further  
2 allege that the “Estimated Borrowers [sic] Closing Statement,” provided to them on February 27, 2007,  
3 included the YSP. (Compl. ¶¶39, 40). As Plaintiffs admit that the YSP was disclosed on February 27,  
4 2007, Plaintiffs’ RESPA claim is untimely. The complaint was not filed until August 8, 2008.  
5 Additionally, because Plaintiffs’ untimely RESPA claims are barred as a matter of law, leave to amend  
6 the complaint would be futile. Accordingly, plaintiffs’ RESPA claims are dismissed without leave to  
7 amend. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

8 **Intentional Interference with Contractual Relations Claim**

9 Plaintiffs’ third claim is for an intentional interference with contractual relations against Saxon.  
10 To recover in tort for intentional interference with the performance of a contract, plaintiffs must plead  
11 and prove: (1) a valid contract with a third party; (2) defendants’ knowledge of the contract; (3)  
12 defendants’ intentional acts designed to induce breach or disruption of the contractual relationship; (4)  
13 actual breach or disruption of the contractual relationship; and (5) resulting damages. *Quelimane Co.*  
14 *v. Stewart Title Guarantee Co.*, 19 Cal. 4th 26, 55 (1998).

15 From the allegations of the complaint, plaintiffs appear to allege that Saxon intentionally  
16 interfered with a fiduciary duty Pacific owed plaintiffs to them by offering the YSP. Plaintiffs allege  
17 that: (1) Plaintiffs entered into a contract with Pacific whereby they would pay a fee to Pacific in  
18 consideration of Pacific acting as their agent in procuring a loan for them (Comp. ¶59); (2) Saxon knew  
19 Plaintiffs had a contract with Pacific in conjunction with the loan transaction at issue (Compl. ¶60); (3)  
20 Saxon induced Pacific to breach its agency contract with, and its duty owed to, Plaintiffs by offering and  
21 paying Pacific an illicit payment to steer Plaintiffs to Saxon for a loan at artificially inflated rates and  
22 terms (Compl. ¶61); and (4) Plaintiffs were damaged by Saxon’s conduct in that they unwittingly signed  
23 the loan at a higher interest rate and points than were actually available to them from Saxon (Comp.¶  
24 62). Plaintiffs allege that Pacific “was an agent for Plaintiffs by express and implied contract and by  
25 operation of law.” Compl. ¶67. Thus, plaintiffs contend that Saxon induced Pacific to breach its  
26 fiduciary duty by offered the yield spread premium.

27 Defendants argue that plaintiffs’ claim must be dismissed because plaintiffs failed to aver  
28 specific ultimate facts to show how defendants maliciously intended to interfere with plaintiffs’

1 contractual relations with Pacific. Defendants’ argument fails on two grounds. First, defendants err by  
2 asserting that plaintiffs must plead with specificity this claim. Fed. R. Civ. P. 8 requires a complaint  
3 to contain “a short plain statement of the claim showing that the pleader is entitled to relief.” To comply  
4 with Rule 8, a plaintiff “must plead a short and plain statement of the elements of his or her claim,  
5 identifying the transaction or occurrence giving rise to the claim and the elements of the prima facie  
6 case.” *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000). Plaintiffs allegations comply  
7 with the Rule 8 pleading standard. Second, defendants’ contention that plaintiffs must plead and prove  
8 that defendants “maliciously intended to interfere” with plaintiffs’ contractual relationship with Pacific  
9 is erroneous. “Because interference with an existing contract receives greater solicitude than does  
10 interference with prospective economic advantage, it is not necessary that the defendant’s conduct be  
11 wrongful apart from the interference with the contract itself.” *Quelimane Co.*, 19 Cal. 4th at 55. The  
12 “additional aspect of wrongfulness is not an element of the tort of intentional interference with an  
13 existing contract.” *Id.* at 56. Accordingly, defendants’ motion to dismiss this cause of action is denied.

#### 14 Restitution

15 Plaintiffs assert a (fifth) restitution claim against Saxon. Plaintiffs allege that Saxon has been  
16 unjustly enriched by the portion of monthly payment it collects from plaintiffs that is “attributable to the  
17 artificial, inflated component of plaintiffs’ loan contract.” (Compl. ¶76). Defendants argue that plaintiffs  
18 fail to state a cause of action for restitution because any money paid by plaintiffs on their loan was  
19 required by the loan documents executed by plaintiffs.

20 Under the law of restitution, a defendant “is required to make restitution if he or she is unjustly  
21 enriched at the expense of another.” *First Nationwide Savings v. Perry*, 122 Cal. App. 4th 1657, 1662  
22 (1992). “[R]estitution may be awarded where the defendant obtained a benefit from the plaintiff by  
23 fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort,  
24 but instead to seek restitution on a quasi-contract theory.” *McBride v. Boughton*, 123 cal. App. 4th 379,  
25 388 (2004).

26 Based on the survival of the fraud by concealment claim, as discussed more fully below,  
27 plaintiffs’ restitution claim shall not be dismissed.

28

1 **Fraud by Concealment**

2 Plaintiffs’ (sixth and seventh) fraud by concealment claims against Saxon and Pacific are based  
3 on the following allegations: (1) Saxon represented to plaintiffs that “YSP to Pacific paid by lender POC  
4 \$10,350;” (2) Saxon and Pacific intentionally suppressed and concealed from plaintiffs the fact that  
5 Saxon was paying Pacific to steer plaintiffs to Saxon for a mortgage loan; (3) Saxon and Pacific  
6 intentionally suppressed and concealed from plaintiffs the fact that Saxon paid Pacific \$10,350 to charge  
7 plaintiffs a higher interest rate; and (4) in executing the loan, plaintiffs unwittingly agreed to pay illegal  
8 and improper charges.

9 Defendants argue that plaintiffs’ fraud by concealment claim fails because plaintiffs fail to allege  
10 that Saxon owed them a fiduciary duty. However, failure to allege a fiduciary duty is not fatal to  
11 plaintiffs’ claim necessarily. “There are four circumstances in which nondisclosure or concealment may  
12 constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2)  
13 when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the  
14 defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial  
15 representations but also suppresses some material facts.” *OCM Principal Opportunities Fund v. CIBC*  
16 *World Markets Corp.*, 157 Cal. App. 4th 835, 859 (2007) (quoting *LiMandri v. Jenkins*, 52 Cal. App.  
17 4th 326, 336 (1997)). Where no fiduciary relationship exists, “the duty to disclose presupposes some  
18 sort of transaction between the parties. Thus, a duty to disclose may arise [between] parties entering into  
19 any kind of contractual relationship.” *OCM Principal*, 157 Cal. App. 4th at 859. Here, plaintiffs and  
20 Saxon entered into a contractual relationship with the 2007 Loan. Accordingly, plaintiffs’ fraud by  
21 concealment claims survive.

22 **TILA claims**

23 Plaintiffs assert two claims based on the federal Truth In Lending Act. First, plaintiffs assert a  
24 rescission claim based on the allegation that Pacific and Saxon failed to disclose that plaintiffs had a  
25 right to rescind the 2007 Loan, in violation of 15 U.S.C. §1635(a). Second, plaintiffs assert a damages  
26 claim based on Pacific’s and Saxon’s alleged failure to deliver material disclosures and failure to  
27 respond to plaintiffs’ Notices of Rescission.

28 Plaintiffs’ (eighth) rescission cause based on the 2007 Loan transaction fails to state a claim.

1 A “transaction which constitutes a refinancing or consolidation...by the same creditor secured by an  
2 interest in the same property” is exempted from the provision that requires disclosure of the right to  
3 rescind. 15 U.S.C. §1635(e)(2). Here, plaintiffs 2007 Loan was a refinancing of the two prior loans with  
4 Saxon and secured by the property. Accordingly, plaintiffs’ eighth cause of action is dismissed.

5 Defendants argue that plaintiffs’ (ninth) TILA damages claim is barred by the statute of  
6 limitations. The statute of limitations to bring a claim for damages under TILA is one year from the date  
7 of the occurrence of the violation. 15 U.S.C. §1640(e). The one-year limitations period commences no  
8 later than the date of actual disclosure of actions constituting the alleged violation. *Katz v. Bank of*  
9 *California*, 640 F.2d 1024, 1025 (9th Cir. 1981). The purported failure to make required disclosures are  
10 deemed to occur at the time the loan documents are signed absent evidence showing fraudulent  
11 concealment or other action to prevent plaintiffs from discovering their claim. *Meyer v. Ameriquest Mtg.*  
12 *Co.*, 342 F.3d 899, 902 (9th Cir. 2003). Here, plaintiffs allege that defendants failed to make material  
13 disclosures and failed to honor plaintiff’s Notice of Rescission. Plaintiffs sent Saxon a Notice of  
14 Rescission on July 31, 2008 and August 5, 2008. Defendants leave unaddressed plaintiffs’ claims of  
15 concealment and Notices of Rescission. Accordingly, defendants’ motion is denied as to this claim.

#### 16 Predatory Mortgage Loan Servicing

17 Plaintiffs (tenth) predatory mortgage loan servicing cause of action fails to satisfy Rule 8 to  
18 plead specific elements of a statutory claim or violation to entitle plaintiffs to requested relief. The  
19 allegations of the cause of action are unintelligible, and the legal basis is unclear. Accordingly, this  
20 cause of action is dismissed.

#### 21 CONCLUSION AND ORDER

22 For the reasons discussed above, this Court:

- 23 1. DISMISSES Ed Bringas as a plaintiff in this action;
- 24 2. DISMISSES with prejudice plaintiffs’ (first and second) RESPA causes of action and  
25 plaintiffs’ (eighth) TILA rescission claim;
- 26 3. DISMISSES without prejudice plaintiffs’ (tenth) predatory mortgage loan servicing  
27 claim;
- 28 4. DENIES defendants’ motion to dismiss plaintiffs’ (third) intentional interference with

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contractual relations claim,(fifth) restitution claim, (sixth and seventh) fraud by concealment claims, and (ninth) TILA damages claim;

- 5. VACATES the February 19, 2009 hearing; and
- 6. ORDERS plaintiffs, no later than March 6, 2009, to file and serve: (a) a first amended complaint to comply with federal pleading requirements and this Court’s Local Rules; or (b) a statement that they abandon their claims. If the first amended complaint is either filed untimely or lacks a cognizable claim and/or sufficient facts for requested relief, this Court will dismiss this action without prejudice on March 9, 2009.

IT IS SO ORDERED.

**Dated: February 13, 2009**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**